Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1994

WILLIAM T. CONKLIN,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

William T. Conklin
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October 20, 1994

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QUESTIONS PRESENTED

I. Did the Court of Appeals err in determining that information on a tax return is not compelled testimony?

II. Did the Court of Appeals err in holding a pro se litigant to the standards of an attorney?

III. Did the Court of Appeals err in ruling that the petitioner took a "blanket-fifth" when he sent in an unsigned return that contained assessment information and supporting documents?

LIST OF PARTIES

The parties to the proceedings are the petitioner and the respondent.

The petitioner represented himself pro se.

The respondent was represented by Philip E. Blondin, Department of Justice Tax Division and William Pharo, United States Attorney in Denver, Colorado and on appeal by Kevin Brown, Jonathan S. Cohen and S. Robert Lyons, U. S. Department of Justice, Tax Division.

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II. The decision of the Tenth Circuit is in conflict with Haines v. Kerner 401 U.S 519.

III. The decision of the Tenth Circuit is in conflict with United States v. Doe 104 S.Ct.

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26 U.S.C. Section 6702

26 U.S.C. Section 7201

26 U.S.C. Section 6020(b)

Fifth Amendment of the United States Constitution

CASES

Garner v. United States, 424 U. S. 648 (1975)

Haines v. Kerner, 401 U.S. 519 (1972)

United States v. Doe, 104 S. Ct. 1237 (1984).

United States v. Sullivan, 74 U. S. 259 (1926)

IN THE SUPREME COURT OF THE UNITED STATES

January Term 1995

WILLIAM T. CONKLIN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, William T. Conklin, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above entitled proceeding September 16, 1994.

OPINIONS BELOW The opinion of

the Court of Appeals for the Tenth Circuit is unpublished and is reprinted in the appendix hereto.

The opinion of the United States District Court for the District of Colorado is set forth in the Appendix hereto.

JURISDICTION

Jurisdiction of the United States District Court for the District of Colorado is Title 28 Section 1346(a)(1).

On petitioner's appeal to the United States Court of Appeals, the Court denied the appeal on the issues on September 16, 1994. The jurisdiction of the court of Appeals to hear the case was invoked under 28 U.S.C. 1291.

The jurisdiction of this court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Section 6702. Frivolous Return

Statue provides as follows:

(a) Civil penalty.
If--
(1) Any individual files what purports to be a return of the tax imposed by subtitle A but which--
(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or
(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and
(2) the conduct referred to in paragraph (1) is due to--(A) A position which is frivolous, or
(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws, then such individual shall pay a penalty of $500.00.

ARTICLE V: UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself,** nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. (emphasis, mine)

STATEMENT OF THE CASE

William T. Conklin, the appellant in this action, hereinafter referred to as "Conklin" was classified as an illegal tax protestor by the IRS for his involvement in the Church of World Peace. His case was set aside for special scrutiny by the Internal Revenue Service Criminal Investigation Division. There can be no question that he was confronted with substantial and real hazards of incrimination by virtue of the Criminal Investigation's Interest in his case. He became concerned about waiving his Fifth Amendment Rights on a 1040 return after speaking with several attorneys who

advised him that he does waive his Fifth Amendment Rights when he signs a return.

So, Conklin, in an attempt to comply with the law and not voluntarily waive his Fifth Amendment Rights, filed a return with payment and the necessary assessment information. He did not sign the return but instead he provided a power of attorney form giving the IRS power of attorney to sign the return if they could do so without waiving his Fifth Amendment Rights.

The IRS assessed Conklin a $500 penalty for filing a frivolous return, Conklin paid the fine and filed a claim for a refund. The IRS denied the claim and Conklin filed suit in 1989.

The lower Court ruled May 2, 1994 that the IRS imposition of the penalty was justified and the Tenth Circuit affirmed the opinion on September 10,

1994 and sanctioned Conklin with attorney's fees and double costs.

REASONS FOR GRANTING THE WRIT

The court ruled that: **"Plaintiff misunderstands the nature of the fifth Amendment Privilege. It protects against compelled testimonial communications."** (emphasis mine) Conklin is a pro se and he naturally has assumed in the past that the testimony on a tax return is a "compelled testimonial communication" in view of the fact that the IRS continually indicts individuals for willful failure to file tax returns under 26 USC 7203. Since the general public believes that information on a tax return is "compelled" and since the Supreme Court has ruled in **Garner v. United States,** 424 U.S. 648 (1975) that information on a tax return is compelled testimony for the

purposes of the Fifth Amendment, it is not unreasonable for a layman to conclude that giving information to the government on a tax return is compelled and that it is testimonial.

The **Garner Court** stated:

> ...The Government compels the filing of a return much as it compels, for example, the appearance of a "witness" before a grand jury. (p. 652).

The **Garner Court** went on to say:

> ...The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a "witness." (p. 656).

The court has taken the position that Conklin's position is frivolous because testimony on a tax return is **NOT** compelled. The Supreme Court in Garner ruled that testimony on a tax return is compelled and that it is Fifth Amendment testimony.

The court sanctioned Conklin with

attorney's fees and double costs even though he relied on counsel. In sanctioning Conklin, the Court held Conklin to the standards of an attorney in direct violation of the law in **Haines v. Kerner**, 404 U.S 519 (30 L.Ed 2d, 1972).

Furthermore, the lower courts ruled that Conklin had taken a blanket Fifth Amendment even though he completed a tax return and provided copies of his tax records to the IRS. In the case of United States v. Doe, 104 S. Ct., 1237 (1984), that an individual waives his Fifth Amendment Rights if he admits to having records. Since Conklin admitted to having records and since he completed his tax return and sent it to the IRS lacking only a signature, he could not have taken a blanket Fifth Amendment.

In view of the fact that the Supreme

Court has ruled in Garner, supra that information on a tax return is "compelled testimony," and the District Court for the District of Colorado and the Tenth Circuit have ruled that information on a tax return is not "compelled testimony." And in view of the fact that the lower courts have held Conklin to the standards of an attorney in sanctioning him, and in view of the fact that the Court has taken the position that an individual takes a blanket Fifth Amendment simply by withholding a signature in contradiction of Doe, supra, this Court should correct the refusal of the Court of Appeals to consider Supreme Court cases.

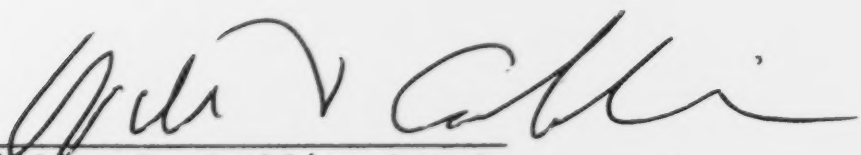
CONCLUSIONS

The issues raised here involve a substantial question about the Fifth Amendment and the obligations of the government to obey the law.

Wherefore it is prayed that this honorable Court will grant the Petition for a Writ of Certiorari.

Respectfully submitted this the

20 th day of October, 1994.



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APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

Docket No. 94-1213

D.C. No. 89-N-1514

Dist of Colorado

WILLIAM T. CONKLIN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

Entered October 11, 1994

Before LOGAN, McWILLIAMS and BARRETT, Circuit Judges.

This matter comes on for

consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon considertaion whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the court

PATRICK FISHER, Chief Deputy Clerk

By: s/ "Audrey F. Weigel"
Deputy Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

September 16, 1994

Docket No. 94-1213

D.C. No. 89-N-1514

Dist of Colorado

WILLIAM T. CONKLIN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER AND JUDGMENT

Before LOGAN, McWILLIAMS and BARRETT,

Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. AP. 34(a) Tenth Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

William T. Conklin (Conklin), a self-described "known tax protestor like Jesus Christ, Thomas Jefferson, Benjamin Franklin and George Washington, " (R., Vol. II. Tab 42 at 1), appeals from an Order and Memorandum of Decision dismissing his complaint and granting summary judgement in favor of the United States. (Internal Revenue Service (IRS).

In February or March, 1988,

Conklin sent the IRS a Form 1040, individual income tax return. The return was accompanied by several Form W-2s relating to wage income, a Form 5948 relating to retirement account information, and several Form 1099s relating to other income. The Form 1040 however, "was bereft of information except for a pre-printed label with plaintiff's name and address." (R., Vol II, Tab 42 at 2).

Several letters were submitted with the Form 1040. Within the letters, Conklin explained the lack of information on the Form 1040 by noting that he had previously given power of attorney to the IRS's district counsel to sign his returns "if they can be signed without waiving my constitutional rights." Id. at 3. Plaintiff also requested that the "IRS complete and sign his 1987 return."

Id. Thereafter, the IRS notified Conklin that it could not accept the Form 1040 because it did not contain information required by law.

In response, Conklin mailed the IRS a second Form 1040 which contained wage data and a claim for the standard deduction. The form indicated that Conklin owed, and had previously paid, $200.00 in income taxes. Conklin however, did not sign the Form 1040. Rather he again referred to the power of attorney included with his 1986 return and implied that the IRS should sign the form for him.

Thereafter, the IRS assessed a $500 Penalty against Conklin pursuant to 26 U.S.C. Section 6702 for filing a frivolous tax return. Conklin promptly paid $75.00 of the penalty as allowed by 26 U.S.C. Section 6703(c) and demanded a

refund. When the IRS refused to refund, Conklin filed this action. Both parties moved for summary judgment.

In granting the IRS' motion for summary judgment, the court found: Conklin's argument that his refusal to sign his 1987 Form 1040 was proper on the grounds that his signature would violate his fifth Amendment Rights was rejected in Betz v. United States, 753 F.2d 834, 835 (10th Cir. 1985) ("It is well settled that the Fifth Amendment general objection (to filing a proper tax return) is not a valid claim of the constitutional privilege."); Conklin's contention that his classification by the IRS as an illegal tax protestor justifies invocation of the Fifth Amendment privilege "misunderstands the nature of the ...privilege...which protects against compelled testimonial

communications...(and) Plaintiff has wholly failed to persuade me that truthful completion of the IRS Form 1040 or any related forms would tend to incriminate him." (R. Vo. II at p. 6).

On appeal, Conklin posits the following issues: "Whether an individual who has been classified as an illegal tax protestor has a valid concern about waiving his fifth Amendment rights when he signs a federal income tax return;" "Whether an individual who has been advised by several attorneys that he will waive his Fifth Amendment Rights on a Federal Tax Return should be penalized when he relied in good faith on the advice of counsel." The government responds that the District Court correctly held that Conklin was liable for the $500.00 frivolous return penalty imposed under Section 6702. Further, the

government urges that we should impose sanctions against Conklin for bringing this frivolous appeal. We agree.

We affirm for substantially the reasons set forth in the district court's Order and Memorandum of Decision dated May 2, 1994

Moreover, "(i)n light of plaintiff's legally frivolous arguments, the award of attorney's fees and double costs (are) justified." Betz, 753 F.2d at 835. See also: Charczuk v. Commissioner of Internal Revenue, 771 F.2d 471, 474-76 (10th Cir. 1985); Martinez v. Internal Revenue Service, 744 F.2d 71, 73 (10th Cir. 1984)

Accordingly, attorney fees and double costs are hereby imposed against Conklin for the taking of a legally frivolous appeal. The matter is REMANDED to the district Court to make the

appropriate determinations.

---

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.RD. 470.

The mandate shall issue forthwith.

Entered for the Court:

James E. Barrett,
Senior United States
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 89 N 1514

WILLIAM T. CONKLIN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant

Filed

United States District Court

Denver, Colorado

May 02, 1994

James R. Manspeaker, Clerk

ORDER AND MEMORANDUM OF DECISION

Plaintiff William T. Conklin is "known tax protestor like Jesus Christ, Thomas Jefferson, Benjamin Franklin and

George Washington," to use the self-description contained in "Plaintiff's Motion in Opposition to Govt's (sic) Motion for Summary Judgment" (filed Dec. 11, 1989). He filed this action to get a refund of the $75.00 he paid towards a $500 penalty assessed by the Internal Revenue Service for filing a frivolous income tax return. His basic position appears to be two-fold. First, he claims, he did not sign the return because he was advised that he could not do so without waiving his rights under the Fifth Amendment to the United States Constitution; rather, he gave the IRS a power of attorney to sign the return, if this could be accomplished without a waiver of such rights. See generally" complaint (Jury Trial Demanded)" (filed Sept. 5. 1989). Second, since he "did not sign the return, (he) did not file

it" and cannot, therefore, be penalized for "filing" a frivolous return. United States' Mem in Supp. of the Renewed Mot.. for Summ. J., Ex. E. (letter from plaintiff to IRS dated Aug. August 9, 1989) (filed Oct. 2, 1990) He also claims that numerous procedural gaffes on the part of the IRS preclude imposition of the penalty.

The Government filed a motion to dismiss or for summary judgment on December 12, 1989. Plaintiff, with alacrity responded to the motion on December 11, 1989, according to the court clerk's filing stamp. By an Order filed May 9, 1990, I denied the Government's motion for failure to comply with Fed. R. Civ. P. 56. The Government renewed its motion; again, I denied it because of new and different procedural inadequacies. See Order

filed Jul 16, 1990). On August 31, 1990, and October 2, 1990 , the government tried again. In addition, plaintiff filed his own motion for summary judgment on August 9, 1990. These motions are now before the Court.

FACTS

In February or March of 1988 the exact date being the subject of a dispute, immaterial for present purposes, plaintiff sent the IRS a Form 1040 (U. S. Individual Income Tax Return). The return was accompanied by several standard forms reporting items of plaintiff's income--a Form W-2 (relating to wage income), a Form 5498 (relating to individual retirement account information), and two Form 1099's (relating to other sorts of income). The Form 1040 itself, however, was bereft of information on, except for a pre-printed label with plaintiff's name

and address. United States Mem. in Supp. of the Renewed Mot for Summ J., Ex. A (filed Oct 2, 1990) (hereinafter simply called "Government's Mot.")

Plaintiff has sworn, and the Government does not dispute, that certain letters were submitted with the Form 1040. Second Decl. of William T. Conklin par 8, attached to Pl.'s Resp. to Def's Mot for Summ. J. (filed Oct. 10, 1990). In one letter plaintiff explained the lack of information the From 1040 by noting that he had previously "given District Counsel power of attorney to sign my returns for me if they can be signed without waiving my constitutional rights." Id., Attach, A-1 (letter IRS from plaintiff dated Jan 29, 1988). The apparent reference is to IRS Form 2848 (Power of Attorney) which plaintiff delivered to the IRS with his

1986 return and which covered '1986 and subsequent years." government's Mot., Ex. E. (letter to IRS from plaintiff dated Aug. 9, 1989, with numerous attachments, one of which is power of attorney.) Plaintiff therefore requested that the IRS complete and sign his 1987 return. Thoughtfully, he sent the return "in plenty of time so that you can get it filed by the April 5, 1988 deadline."

The IRS was unamused. On August 19, 1988, it notified plaintiff that it could not accept the Form 1040 because it did not contain information required by law. Reciprocating plaintiff's thoughtfulness, it "enclosed two blank income tax return forms and an addressed envelope for your convenience in filing a proper return." Government's Mot. Ex. B.

Plaintiff responded to the IRS requires on August 22, 1988. This time, he supplied a Form 1040 which provided identifying information, contained wage data gleaned from the W-2's and 1099's, claimed the standard deduction, and indicated that he owed (and had previously paid) $200 in income taxes. Still, he refused to sign the form, referring instead to the power of attorney and implying that the IRS should sign the form for him.

The IRS remained unimpressed. On August 7, 1989, it wrote:

> Your statement that you are not furnishing information needed to determine your income tax liability based on your constitutional rights is a frivolous position You have been charged a penalty of $500 for filing a document purporting to be an income tax return which contains frivolous (without merit in tax law) arguments to reduce taxes or delay the collection of taxes.

Government's Mot. Ex. D. Plaintiff promptly paid 15% of the penalty ($75)

and demanded a refund. Government Mot. Ex. E. When the IRS refused, he filed this lawsuit.

DISCUSSION

Section 6702 (a) of the Internal Revenue Code provides If--

(1) any individual files what **purports to be a return** of the tax imposed by subtitle About which -

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, ...and

(2) the conduct referred to in paragraph (1) is due to--

(A) a position which is frivolous, or
(B) **a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws, then such individual shall pay a penalty of $500.00.** 26 U.S.C.A. 6702 (West 1989) (emphasis supplied)

The legislative history of this statute indicates that Congress was concerned about the lack of a penalty provision for protest tax returns the situation where, through withholding or

otherwise the taxpayer paid the correct amount of tax . See Senate Rep. 97-494 reprinted in 1982 U.S. Cong and Admin News 1023-25. Congress was troubled about the growth in deliberate defiance by tax protestors and advisors who frequently

emphasize the lack of any penalty when sufficient tax has been withheld from wages and encourage others to play the "audit lottery." The committee believes that an immediately assessable penalty on the filing of protest returns will help deter the filing of such returns, and will demonstrate the determination of the Congress to maintain the integrity of the income tax system.

1982 U.S. Code Cong. and Admin. News at 1024.

With this general background in mind, I turn to plaintiff's specific contentions. He first asserts that his refusal to sign his 1987 Form 1040 is proper on the ground that his signature would amount to a waiver of his Fifth Amendment rights. This is not the law.

Betz v. United States, 753 F.2d 834 (10th Cir. 1985). In **Betz**, the Tenth Circuit affirmed a district court's granting of summary judgment in favor of the Government where a taxpayer sought a refund of the "frivolous return" penalty in 26 U.S.C.A. Section 6702 (West 1989), assessed against him after he filed a return without providing any information on which tax liability could be computed. Plaintiff's argument in **Betz**, like Conklin's argument in this case, was a general Fifth Amendment objection to the tax return. According to the Tenth circuit, it is "well-settled that the Fifth Amendment general objection is not valid claim of constitutional privilege." Betz, 753 F.2d at 835. Not only did the Tenth Circuit affirm summary judgment, but the court went on to award attorney fees and double costs against the

plaintiff for filing a legally frivolous appeal. "(This Court has imposed sanctions where this broad fifth Amendment privilege has been asserted." Id. Although Conklin did provide enough information to calculate his taxes (unlike Betz, who provided no information), another court has found that the deliberate failure to sign a return constitutes furnishing legally insufficient information under the frivolous return penalty provision. In Schneider v. United States, 594 F. Supp 611 (E.d. Mich. 1984), the failure to sign a tax return, even though the return was accurate in all other respects, was held to warrant the imposition of the $500 penalty for a frivolous tax return.

Plaintiff argues that his classification by the IRS as an illegal tax protestor justifies invocation of his

fifth amendment privilege. This classification, he claims, is a clear signal that he is "confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination." Marchetti v. United States, 390 U.S. 39, 53, 88 S. Ct. 697 705 91968) Plaintiff misunderstands the nature of the fifth amendment privilege. It protects against compelled testimonial communications. See United States v. Argomaniz, 925 F.2d 1349, 1352 (11th Cir. 1991), quoting Fisher v. United States, 425 U.S. 391, 409, 96 S. Ct. 1569, 1580 (1976). Plaintiff has wholly failed to persuade me that truthful completion of the IRS Form 1040 or any related forms would tend to incriminate him.

Plaintiff's argument that there were no OMB numbers on the assessment forms, Compl. par 18, is factually

incorrect, and his later argument that OMB numbers were incorrect is legally irrelevant, as is challenge to the assessment procedure. His argument that he was not mailed a copy of the assessment within sixty days is undercut by the fact that he attached a copy of the notice he alleges he never received as Exhibit 9 to the Complaint. See United States' Resp. to Pl. Mot. for an Order Def erring Consideration of the United States' Mot. for Summ. J. at 2. I have also reviewed all of plaintiff's other arguments. I do not believe that case law supports those arguments. Accordingly, it is ORDERED as follows:

1. The Government's motions for summary judgment filed August 31, 1990 and October 2, 1990 are GRANTED.

2. Plaintiff's motion for summary judgment filed August 9, 1990 is DENIED.

3. All other motions are denied as moot.

Dated this the 2nd day of MAY, 1994

By the Court:

S/ "Edward W. Nottingham"

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 89 N 1514

WILLIAM T. CONKLIN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant

Filed

United States District Court

Denver, Colorado

May 02, 1994

James R. Manspeaker, Clerk

JUDGMENT

Pursuant to and in accordance with the Order and Memorandum of Decision signed May 2, 1994 by the Honorable Edward W. Nottingham, United States

District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that judgment is hereby entered in favor of the defendant United States of America and against the plaintiff William T. Conklin. It is

FURTHER ORDERED that this action and complaint are hereby dismissed with prejudice, each party to bear their own costs.

DATED at Denver, Colorado this 2nd day of May, 1994.

Entered on the Docket May 2, 1994

For the Court:

JAMES R. MANSPEAKER, CLERK

By: S/ "Stephen P. Ehrlich,"

Chief Deputy Clerk